

AMENDED IN SENATE APRIL 8, 2008

AMENDED IN SENATE MARCH 24, 2008

SENATE BILL

No. 1267

Introduced by Senator Yee

February 19, 2008

An act to amend Sections 8547.2, 8547.8, 19683, and 19683.5 of the Government Code, relating to whistleblower protections.

LEGISLATIVE COUNSEL'S DIGEST

SB 1267, as amended, Yee. Whistleblower protection.

(1) The California Whistleblower Protection Act authorizes a state employee or an applicant for state employment to file a complaint, as specified, with the State Personnel Board alleging reprisal, retaliation, threats, coercion, or similar improper conduct prohibited under the act. Under that act, once it has been demonstrated by a preponderance of the evidence that conduct protected by the act was a contributing factor to the alleged retaliation against the complaining party, the supervisor, manager, or appointing power is required to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons.

This bill would in addition provide that the act applies to former employees, as specified.

This bill would require the *administrative law* judge in *a civil or* an administrative action filed on or after January 1, 2009, to make a finding after the plaintiff has completed presenting the evidence in his or her case in chief, of whether the plaintiff demonstrated by a preponderance of evidence that an activity—~~prohibited~~ *protected* by the California Whistleblower Protection Act was a contributing factor in the alleged retaliation.

This bill would also require the board, through its executive officer, to determine within 10 working days of the submission date of a complaint filed for which the board initiates an investigation, whether the complaint and any materials submitted with it demonstrates by a preponderance of evidence that an activity ~~prohibited~~ *protected* by the act was a contributing factor in the alleged retaliation.

(2) Existing law requires the State Personnel Board to initiate a hearing or investigation of a written complaint of reprisal or retaliation that is prohibited by the California Whistleblower Protection Act within 10 working days of its submission. The executive officer is required to complete findings of the hearing or investigation within 60 working days thereafter and provide a copy of the findings to the complaining state employee or applicant for state employment and to the appropriate supervisor, manager, employee, or appointing authority. When the allegations contained in a complaint of reprisal or retaliation are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate form.

This bill would provide that complaints may be consolidated only with the written consent of the *complaining* party or parties. The bill would also prohibit the continuing of a matter if it would ~~exceed the 60-working-day timeframe~~ *cause the dispute to continue in an undecided state beyond 70 working days of the complaint's submission*. Additionally, the bill would divest the board of jurisdiction if the executive officer fails to complete the findings within ~~60~~ 70 working days *of the complaint's submission*, and would then require the board to issue a right-to-sue notice to the complaining party.

(3) Existing law permits the supervisor, manager, employee, or appointing power to request a hearing before the State Personnel Board regarding the findings of the executive officer if the executive officer finds that the supervisor, manager, employee, or appointing power retaliated against the complainant for engaging in protected whistleblower activities. Existing law provides that if, after that hearing, the State Personnel Board determines that a violation of the California Whistleblower Protection Act occurred, or if no hearing is requested and the findings of the executive officer conclude that improper activity has occurred, the board may order any appropriate relief.

This bill would specify that appropriate relief may include attorney's fees, expert witness fees, and costs for successful prosecution of a retaliation complaint before the board.

(4) Existing law requires a public entity that provides for the defense of a state employee charged with a violation of the California Whistleblower Protection Act to reserve all rights to be reimbursed for any costs incurred in that defense. If a state employee is found to have violated the act, he or she is liable for all defense costs and is required to reimburse the public entity for those costs.

This bill would provide that if a state employee is successful in an action brought before the board pursuant to those provisions, the complaining employee shall be reimbursed for all costs incurred, including attorney's fees.

This bill would also require the administrative law judge to make any orders *as that* may appear just in order to prevent any named party from being embarrassed, delayed, or put to ~~undue~~ *unnecessary* expense, and may make other orders as the interests of justice may require *during the administrative process*, in all cases.

The bill would also make technical, conforming changes to those provisions.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. The Legislature finds and declares the following:
- 2 (a) It is the public policy of this state to protect and safeguard
- 3 the right and freedom of all former, current, and prospective public
- 4 employees, as well as members of the public interacting with state
- 5 government, the California State University, and the University
- 6 of California to report waste, fraud, abuse of authority, violation
- 7 of law, or threat to public health and safety without restraint or
- 8 fear of retribution or actual retribution due to having engaged in
- 9 a protected disclosure reporting those government improprieties.
- 10 (b) Public servants best serve the citizenry when they can be
- 11 candid and honest without reservation in conducting the people's
- 12 business.
- 13 (c) The practice of restraining and retaliating against public
- 14 servants by denying employment or contractual opportunity,
- 15 creating hostile work environments, and discriminating in the terms
- 16 or conditions of employment or contract for these reasons foments
- 17 ~~domestic strife and unrest~~ *unrest and dissatisfaction*, deprives the
- 18 state of the fullest use of its capacities for development and

1 advancement, and substantially and adversely affects the interest
2 of public employees, employers, and the public in general.

3 (d) The practice of restraining and retaliating against others
4 because of their protected disclosure of improper governmental
5 activities is declared to be against public policy.

6 (e) The purpose of this act is to provide effective, efficient
7 remedies that will eliminate these retaliatory practices.

8 (f) This act shall be deemed an exercise of the police power of
9 the state for the protection of the welfare, health, and peace of the
10 people of this state.

11 SEC. 2. Section 8547.2 of the Government Code is amended
12 to read:

13 8547.2. For the purposes of this article:

14 (a) "Employee" means any individual appointed by the Governor
15 or employed or holding office in a state agency as defined by
16 Section 11000, including, for purposes of Sections 8547.3 to
17 8547.7, inclusive, any employee of the California State University.
18 "Employee" includes any former employee who met the criteria
19 of this subdivision during his or her employment.

20 (b) "Improper governmental activity" means any activity by a
21 state agency or by an employee that is undertaken in the
22 performance of the employee's official duties, whether or not that
23 action is within the scope of his or her employment, and that (1)
24 is in violation of any state or federal law or regulation, including,
25 but not limited to, corruption, malfeasance, bribery, theft of
26 government property, fraudulent claims, fraud, coercion,
27 conversion, malicious prosecution, misuse of government property,
28 or willful omission to perform duty, or (2) is economically
29 wasteful, or involves gross misconduct, incompetency, or
30 inefficiency. For purposes of Sections 8547.4, 8547.5, 8547.10,
31 and 8547.11, "improper governmental activity" includes any
32 activity by the University of California or by an employee,
33 including an officer or faculty member, who otherwise meets the
34 criteria of this subdivision.

35 (c) "Person" means any individual, corporation, trust,
36 association, any state or local government, or any agency or
37 instrumentality of any of the foregoing.

38 (d) "Protected disclosure" means any good faith communication
39 that discloses or demonstrates an intention to disclose information
40 that may evidence (1) an improper governmental activity or (2)

1 any condition that may significantly threaten the health or safety
2 of employees or the public if the disclosure or intention to disclose
3 was made for the purpose of remedying that condition.

4 (e) “Illegal order” means any directive to violate or assist in
5 violating a federal, state, or local law, rule, or regulation or any
6 order to work or cause others to work in conditions outside of their
7 line of duty that would unreasonably threaten the health or safety
8 of employees or the public.

9 (f) “State agency” is defined by Section 11000. “State agency”
10 includes the University of California for purposes of Sections
11 8547.5 to 8547.7, inclusive, and the California State University
12 for purposes of Sections 8547.3 to 8547.7, inclusive.

13 SEC. 3. Section 8547.8 of the Government Code is amended
14 to read:

15 8547.8. (a) A state employee or applicant for state employment
16 who files a written complaint with his or her supervisor, manager,
17 or the appointing power alleging actual or attempted acts of
18 reprisal, retaliation, threats, coercion, or similar improper acts
19 prohibited by Section 8547.3, may also file a copy of the written
20 complaint with the State Personnel Board, together with a sworn
21 statement that the contents of the written complaint are true, or are
22 believed by the affiant to be true, under penalty of perjury. The
23 complaint shall be filed with the board within 12 months of the
24 most recent act of reprisal set forth in the complaint.

25 (b) Any person who intentionally engages in acts of reprisal,
26 retaliation, threats, coercion, or similar acts against a state
27 employee or applicant for state employment for having made a
28 protected disclosure; is subject to a fine not to exceed ten thousand
29 dollars (\$10,000) and imprisonment in the county jail for a period
30 not to exceed one year. Pursuant to Section 19683, any state civil
31 service employee who intentionally engages in that conduct shall
32 be disciplined by adverse action as provided by Section 19572.

33 (c) In addition to all other penalties provided by law, any person
34 who intentionally engages in acts of reprisal, retaliation, threats,
35 coercion, or similar acts against a state employee or applicant for
36 state employment for having made a protected disclosure shall be
37 liable in an action for damages brought against him or her by the
38 injured party. Punitive damages may be awarded by the court if
39 the acts of the offending party are proven to be malicious. Where
40 liability has been established, the injured party shall also be entitled

1 to reasonable attorney's fees as provided by law. However, any
2 action for damages shall not be available to the injured party unless
3 the injured party has first filed a complaint with the State Personnel
4 Board pursuant to subdivision (a), and the board has issued, or
5 failed to issue, findings pursuant to Section 19683.

6 (d) This section is not intended to prevent an appointing power,
7 manager, or supervisor from taking, directing others to take,
8 recommending, or approving any personnel action or from taking
9 or failing to take a personnel action with respect to any state
10 employee or applicant for state employment if the appointing
11 power, manager, or supervisor reasonably believes any action or
12 inaction is justified on the basis of evidence separate and apart
13 from the fact that the person has made a protected disclosure as
14 defined in subdivision (d) of Section 8547.2.

15 (e) (1) In any civil action or administrative proceeding, once
16 it has been demonstrated by a preponderance of evidence that an
17 activity protected by this article was a contributing factor in the
18 alleged retaliation against a former, current, or prospective
19 employee, the burden of proof shall be on the supervisor, manager,
20 or appointing power to demonstrate by clear and convincing
21 evidence that the alleged action would have occurred for legitimate,
22 independent reasons even if the employee had not engaged in
23 protected disclosures or refused an illegal order.

24 (A) In an administrative action filed on or after January 1, 2009,
25 the *administrative law* judge shall make a finding after the plaintiff
26 has completed presenting the evidence in his or her case in chief,
27 of whether the plaintiff demonstrated by a preponderance of
28 evidence that an activity ~~prohibited~~ *protected* by this article was
29 a contributing factor in the alleged retaliation.

30 (B) If the State Personnel Board initiates an investigation of the
31 complaint rather than a hearing pursuant to Section 19683, the
32 board, through its executive officer, shall determine within 10
33 working days of the submission date of the complaint, whether
34 the complaint and any materials submitted with it demonstrates
35 by a preponderance of the evidence that an activity ~~prohibited~~
36 *protected* by this article was a contributing factor in the alleged
37 retaliation. This subparagraph shall apply to a complaint filed with
38 the board on and after January 1, 2009, that satisfies the filing
39 requirements set forth in Section 56.1 of Title 2 of the California
40 Code of Regulations.

1 (2) In an ~~affirmative~~ *adverse* action taken against an employee
2 in which the employee demonstrates, by a preponderance of the
3 evidence, that retaliation was a contributing factor to the adverse
4 action taken against him or her, the employee shall have a complete
5 affirmative defense to the adverse action.

6 (f) Nothing in this article shall be deemed to diminish the rights,
7 privileges, or remedies of any employee under any other federal
8 or state law or under any employment contract or collective
9 bargaining agreement.

10 SEC. 4. Section 19683 of the Government Code is amended
11 to read:

12 19683. (a) The State Personnel Board, through its executive
13 officer, shall initiate a hearing or investigation of a written
14 complaint of reprisal or retaliation as prohibited by Section 8547.3
15 within 10 working days of its submission. The executive officer
16 shall complete findings of the hearing or investigation within 60
17 working days thereafter, and shall provide a copy of the findings
18 to the complaining state employee or applicant for state
19 employment and to the appropriate supervisor, manager, employee,
20 or appointing authority. When the allegations contained in a
21 complaint of reprisal or retaliation are the same as, or similar to,
22 those contained in another appeal, the executive officer may
23 consolidate the appeals into the most appropriate format only with
24 the written consent of the *complaining party or parties*. ~~Under no~~
25 ~~circumstances shall the matter~~ *The matter shall not* be continued
26 if it will cause the dispute to continue in an undecided state beyond
27 60 working days. If the executive officer fails to complete the
28 findings within ~~60 working days~~ *70 working days of the*
29 *complaint's submission*, the State Personnel Board shall be divested
30 of *its* jurisdiction and shall issue a right-to-sue notice to the
31 complaining party *stating that (1) the State Personnel Board failed*
32 *to make the finding as required by this subdivision within the*
33 *70-day period and (2) the complaining party may file a civil*
34 *complaint with the superior court pursuant to subdivision (c) of*
35 *Section 8547.8 of the Government Code.*

36 (b) If the executive officer finds that the supervisor, manager,
37 employee, or appointing power retaliated against the complainant
38 for engaging in protected whistleblower activities, the supervisor,
39 manager, employee, or appointing power may request a hearing
40 before the State Personnel Board regarding the findings of the

1 executive officer. The request for hearing and any subsequent
2 determination by the board shall be made in accordance with the
3 board's normal rules governing appeals, hearings, investigations,
4 and disciplinary proceedings.

5 (c) If, after the hearing described in subdivision (b), the State
6 Personnel Board determines that a violation of Section 8547.3
7 occurred, or if no hearing is requested and the findings of the
8 executive officer conclude that improper activity has occurred, the
9 board may order any appropriate relief, including, but not limited
10 to, attorney's fees, expert witness fees, and costs for successful
11 prosecution of a retaliation complaint before the State Personnel
12 Board, reinstatement, backpay, restoration of lost service credit,
13 if appropriate, compensatory damages, and the expungement of
14 any adverse records of the state employee or applicant for state
15 employment who was the subject of the alleged acts of misconduct
16 prohibited by Section 8547.3.

17 (d) Whenever the board determines that a manager, supervisor,
18 or employee, who is named a party to the retaliation complaint,
19 has violated Section 8547.3 and that violation constitutes legal
20 cause for discipline under one or more subdivisions of Section
21 19572, it shall impose a just and proper penalty and cause an entry
22 to that effect to be made in the manager's, supervisor's, or
23 employee's official personnel records.

24 (e) Whenever the board determines that a manager, supervisor,
25 or employee, who is not named a party to the retaliation complaint,
26 may have engaged in or participated in any act prohibited by
27 Section 8547.3, the board shall notify the manager's, supervisor's,
28 or employee's appointing power of that fact in writing. Within 60
29 days after receiving the notification, the appointing power shall
30 either serve a notice of adverse action on the manager, supervisor,
31 or employee, or set forth in writing its reasons for not taking
32 adverse action against the manager, supervisor, or employee. The
33 appointing power shall file a copy of the notice of adverse action
34 with the board in accordance with Section 19574. If the appointing
35 power declines to take adverse action against the manager,
36 supervisor, or employee, it shall submit its written reasons for not
37 doing so to the board, which may take adverse action against the
38 manager, supervisor, or employee as provided in Section 19583.5.
39 A manager, supervisor, or employee who is served with a notice

1 of adverse action pursuant to this section may file an appeal with
2 the board in accordance with Section 19575.

3 (f) In order for the Governor and the Legislature to determine
4 the need to continue or modify state personnel procedures as they
5 relate to the investigations of reprisals or retaliation for the
6 disclosure of information by public employees, the State Personnel
7 Board, by June 30 of each year, shall submit a report to the
8 Governor and the Legislature regarding complaints filed, hearings
9 held, and legal actions taken pursuant to this section.

10 (g) In all cases, *including those where individually named*
11 *respondents have joined in a consolidated hearing*, the
12 administrative law judge shall make any orders ~~as that~~ may appear
13 just in order to prevent any named party from being embarrassed,
14 delayed, or put to ~~undue~~ *unnecessary* expense, and may make other
15 orders as the interests of justice may require *during the*
16 *administrative process*.

17 SEC. 5. Section 19683.5 of the Government Code is amended
18 to read:

19 19683.5. If a state employee is successful in an action brought
20 pursuant to Section 19683, the complaining employee shall be
21 reimbursed for all costs incurred, including attorney's fees.